NAVAJO NATION,	:	Order Denying Stay
Appellant	:	
	:	
v.	:	
	:	Docket No. IBIA 88-38-A
DEPUTY TO THE ASSISTANT	:	
SECRETARY--INDIAN AFFAIRS	:	
(OPERATIONS),	:	
Appellee	:	August 30, 1988

On August 29, 1988, the Board of Indian Appeals received a notice of appeal and motion for stay from the Navajo Nation, through counsel, David L. Nash, Esq., Window Rock, Arizona. Appellant states that it presently has two appeals pending before the Deputy to the Assistant Secretary--Indian Affairs (Operations) concerning grazing on lands added to the Navajo Reservation pursuant to 25 U.S.C. § 640d-10 (1982). One appeal is from a June 16, 1988, decision of the Navajo Area Director declining to issue grazing permits recommended by appellant. The other is from a June 17, 1988, notice issued by the Acting Navajo Area Director, entitled "General Notice of Intent to Impound Unauthorized Livestock within the Boundaries of New Lands (Formerly Known as the Spurlock, Wallace, Chambers, Roberts, Kelsey, Fitzgerald and Bar N Ranches)." By letters dated August 1, 1988 (The date of this letter is not apparent on the Board's copy), and August 1988, the Deputy to the Assistant Secretary and Acting Deputy to the Assistant Secretary rendered both actions of the Area Director immediately effective pursuant to 25 CFR 2.3(b). 1/ On August 26, 1988, the Area Director issued a 5-day notice letter, stating that unauthorized livestock owned by certain Navajo tribal members had been observed on Chambers Ranch, New Lands, and was subject to impoundment if not removed within 5 days.

Through this interlocutory appeal to the Board, appellant seeks a stay of the decisions of the Deputy to the Assistant Secretary which rendered the Area Director's actions immediately effective. It requests a Board decision on its motion for stay by 5:00 p.m., August 30, 1988. Appellant asserts that the tribal members affected will suffer severe harm if their livestock is impounded, because

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1/ 25 CFR 2.3(b) provides in relevant part:

"In order to insure the exhaustion of administrative remedies before resort to court action, no decision which at the time of its rendition is subject to appeal to a superior authority in the Department shall be considered final so as to be agency action subject to judicial review under 5 U.S.C. 704, unless when an appeal is filed, the officer to whom the appeal is made shall rule that the decision appealed from shall be made immediately effective."

they would be deprived of an important means by which they make a living and feed themselves. Appellant also argues that it has raised significant issues which are likely to succeed on the merits. It states that "[t]he key issues on appeal will concern the validity of all and various portions of the [Navajo and Hopi Indian Relocation] Commission's grazing regulations at 25 CFR §§700.701 et seq." (Motion for Stay at 5).

This request for stay is a matter of first impression with the Board. The Board concludes that in order to show that it is entitled to a stay, appellant must show that it can meet the traditional standards for the grant of a preliminary injunction in the federal courts. See, e.g., Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975). 2/ It must show, therefore, (1) that it will suffer irreparable harm if a stay is not granted and (2) that it is likely to succeed on the merits before the Board. Here, although appellant may be able to show irreparable harm to tribal members if their livestock is impounded, it is unable to show that it is likely to succeed on the merits of its appeal before the Board. Appellant's entire appeal, as described in its motion for stay, is a challenge to the regulations at 25 CFR 700.701-729. The Board, on a number of occasions, has held that it has no authority to declare duly promulgated regulations invalid. E.g., Northern Natural Gas v. Minneapolis Area Director, 15 IBIA 124, 126 (1987); Sohappy v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 14 IBIA 100, 104-105, 93 I.D. 176, 178-179 (1986); Zarr v. Acting Deputy Director, Office of Indian Education Programs, 11 IBIA 174, 177, 90 I.D. 172, 174 (1983). Accordingly, there appears to be no likelihood that appellant can succeed on the merits of its appeal before the Board.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, appellant's request for a stay of the decisions of the Deputy to the Assistant Secretary--Indian Affairs (Operations) is denied.

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Anita Vogt
Administrative Judge

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Kathryn A. Lynn
Chief Administrative Judge

2/ Two other factors are also weighed by the federal courts in determining whether to grant preliminary injunctions: (1) the possibility of substantial harm to other parties caused by issuance of the injunction and (2) the public interest. E.g., National Wildlife Federation v. Burford, 835 F.2d 305, 318 (D.C. Cir. 1987). In this case, because of appellant's assertion that immediate action by the Board is necessary, the Board has insufficient opportunity to seek information with which to consider these factors and, in any event, finds it unnecessary to consider them because appellant has failed to meet the critical standard of a showing of likely success on the merits.